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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION

Petitioner,

v.

SHELL OIL COMPANY, ET AL.,

Respondents.

No. 77-1654

CONSUMER FEDERATION OF AMERICA,
ENERGY POLICY TASK FORCE,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS TENNECO OIL COMPANY AND PENNZOIL COMPANY IN OPPOSITION

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INDEX

	Page
Opinions Below And Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement Of The Case	2
Argument	3
The Commission Does Not Have The Authority To Regulate Production Activities	3
Conclusion	10
Certificate of Service	11

CITATIONS

Cases

Colorado Interstate Gas. Co. v. *FPC*, 324 U.S. 581 (1945)	3-7
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	8
FPC v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949)	3-8
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954)	3, 5-7
United Gas Improvement Co. v. *Continental Oil Co.*, 381 U.S. 392 (1965)	3, 5, 7

Statutes

Energy Policy and Conservation Act, 42 U.S.C. § 6214	9
Federal Mineral Leasing Act, 30 U.S.C. § 181, *et seq.*	8
Natural Gas Act	
Section 1(b), 15 U.S.C. § 717(b)	2-9
Section 7(b), 15 U.S.C. § 717f(b)	2, 6
Section 7(c), 15 U.S.C. § 717f(c)	2, 6
Section 7(e), 15 U.S.C. § 717f(e)	2
Outer Continental Shelf Lands Act, 43 U.S.C. § 1331-1343	8
Tex. Rev. Stat. Ann. art. 6059c	8

Regulations

30 C.F.R. §§ 250.1, *et seq.*	8

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OPINIONS BELOW AND JURISDICTION

The opinions below are correctly referenced and the jurisdictional prerequisites are adequately set forth in the petitions for a writ of certiorari.

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission (Commission) has authority to regulate the physical activities of production of natural gas either directly or indirectly by imposing conditions on production activities in certificates of public convenience and necessity authorizing sales of natural gas in interstate commerce for resale.[1]

STATUTES INVOLVED

Sections 1(b), 7(b), 7(c), and 7(e) of the Natural Gas Act, 15 U.S.C. §§ 717(b), 717f(b), 717f(c), and 717f(e) are correctly set forth in the Commission's Petition For a Writ of Certiorari.

STATEMENT OF THE CASE

By its Order 539-B, which is the subject of this proceeding, the Commission adopted a new Section 157.41 of its Rules and Regulations. Section 157.41 provides that on and after July 30, 1976 every producer certificate authorizing the sale of natural gas in interstate commerce for resale shall contain a condition requiring the seller to operate the property from which the gas is to be produced as a "prudent operator". The Commission also concluded in Order 539-B that this development and production condition is "implicit" in all producer certificates issued prior to July 30, 1976. Thus, by Order 539-B the Commission has undertaken to regulate the activities of producers in the operation of their oil and gas properties.

On review, the United States Court of Appeals for the Fifth Circuit vacated Order 539-B, holding that the Commission has no authority to regulate production activities. Specifically, the Court held that Section 1(b) of the Natural

[1] A second question is raised in the Petition filed by Consumer Federation of America. Because that issue was not decided in any manner by the Court of Appeals, it has no bearing on whether the Petitions should be granted.

Gas Act,[2] as interpreted on numerous occasions by this Court, expressly excludes from the Commission's jurisdiction the physical activities of production.

ARGUMENT

A writ of certiorari should not be granted in this case because the single question presented has already been answered by this Court on numerous occasions. The question is whether the Commission has the authority to regulate the physical activities of the production of natural gas. Based on the express language of Section 1(b) of the Gas Act this Court has answered that question in the negative in *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), and in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945).

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO REGULATE PRODUCTION ACTIVITIES

The Commission does not dispute the fact that the Section 157.41 condition adopted by Order 539-B is an assertion by the Commission of jurisdiction over the production activities of producers. Indeed, in adopting Section 157.41, the Commission expressly acknowledged that it was undertaking to regulate " . . . what a reasonably prudent producer would do with respect to the *drilling, completion, workover, recompletion, or abandonment of wells.*" (Commission Pet. at 20a). In its Petition for a Writ of Certiorari, the Commission acknowledged that under Order 539-B, regulation would extend even over the normal operation and maintenance of individual wells. Thus, the Commission's basic position before this Court is that it has "some jurisdiction over the physical acts of the producer and the physical

[2] 15 U.S.C. § 717(b).

operation of the facilities by which certificated service is rendered." (Commission Pet. at 8, 9).

The issue is therefore clearly presented: does the Commission have jurisdiction to regulate the physical activities of production? The answer is also clear: the Commission does not have such jurisdiction. To hold otherwise would be contrary to the intent of Congress and the statutory mandate of the Gas Act.

The Commission's jurisdiction under the Gas Act is set forth in its entirety in Section 1(b) of the Act. That section grants the Commission jurisdiction over the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural gas companies engaged in such transportation or sale. Section 1(b) also specifically provides that the Commission shall *not* have jurisdiction over " . . . the production . . . of natural gas."

The express language of the statute is therefore clear and unambiguous in excluding production activities from the Commission's jurisdiction. Likewise, this Court has recognized this exclusion on numerous occasions in equally clear and unambiguous language. Thus, in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), this Court described the reach of the production exemption as follows:

> "Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like." 324 U.S. at 602-3. (emphasis added).

This Court again addressed the meaning of the Section 1(b) production exemption in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). The Court first recognized that Section 1(b) contains not only a grant of jurisdiction, but also identifies areas expressly excluded from

the Commission's jurisdiction. Among the activities which the Court recognized as being expressly excluded from the Commission's jurisdiction is " . . . the production and gathering of natural gas."[3] Referring to the scope of the production and exemption as set forth in *Colorado Interstate*, the Court once again adhered " . . . to this natural and clear meaning of the words and their obvious expression of congressional intent."[4] Indeed, in *Panhandle* the Commission itself expressly recognized that "the activities of production and gathering, such as drilling, spacing wells, or collecting gas . . . were excluded from the coverage of the Act."[5]

Finally, after determining in *Phillips Petroleum Co.* v. *Wisconsin*[6] that the Commission has jurisdiction over sales of gas by independent producers in interstate commerce for resale, this Court again addressed the meaning of the production exemption of Section 1(b). And, consistent with *Colorado Interstate, Panhandle Eastern*, and the clear language of the Act, the production exemption was once again construed to encompass "the physical activities, processes, and facilities of production. . . . " *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 402 (1965).

Despite the "obvious expression of congressional intent" to preclude Commission jurisdiction over production activities, this Court's determination that the Commission has no jurisdiction over "the physical activities, processes, and facilities of production", and the Commission's own prior representation to this Court that it has no jurisdiction over the activities of production, the Commission now asserts such jurisdiction. Significantly, in making this assertion the Commission does not rely on Section 1(b), which is the only source of its jurisdiction. Instead, the Commission

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[3] 337 U.S. 498, 504.

[4] 337 U.S. 498, 504-5.

[5] *Id.* at 504.

[6] 347 U.S. 672 (1954).

relies on those Sections of the Act which do nothing more than set forth the Commission's powers with respect to those matters which are within the Commission's jurisdiction by virtue of Section 1(b). Thus, the Commission asserts that the Act's grant of authority under Section 7(b) to issue certificates authorizing jurisdictional sales and the grant of authority under Section 7(b) to control abandonment of such sales also somehow includes a grant of jurisdiction over production activities despite the Act's express denial of such jurisdiction under Section 1(b).

This precise argument was made by the Commission and rejected by this Court in *Panhandle.* The Court determined that the Commission's position would strip all meaning from the production exemption:

> "To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress.[7]"

Just as this Court did in *Panhandle,* the Court below correctly rejected the Commission's attempt to negate the express language of the Gas Act excluding production activities from the Commission's jurisdiction.

Faced with the clear and unambiguous holdings in *Colorado Interstate* and *Panhandle,* the Commission in its petition suggests that, after the *Phillips* decision of 1954, this Court retreated from its prior determination in those cases that the Commission has no jurisdiction over the physical activities of production. The Commission also suggests that retreat began in the *Phillips* case. Both suggestions are erroneous.

[7] 357 U.S. at 509 (footnotes omitted).

First, the Commission cites no case and indeed there is no case in which this Court has given the slightest hint that the activities of production are subject to Commission jurisdiction. To the contrary, in 1965, some eleven years after *Phillips,* the Court stated that the production exemption encompasses "the physical activities, processes, and facilities of production. . . ."[8]

Nor does the *Phillips* decision in any way purport to be a departure from the Court's prior determination that the physical activities of production are not within Commission jurisdiction. To the contrary, the Court stated that its determination in *Phillips* was based on its prior interpretation of the production and gathering exemption. After discussing *Panhandle* and *Colorado Interstate,* as well as other cases, the Court concluded:

> "We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act."[9]

This Court has consistently adhered to the Congressional mandate that production activities are not subject to the Commission's control.

The Commission also suggests in its Petition that failure to allow the Commission to regulate production activities would result in a "regulatory gap" in which production activities would be free from regulatory control. In fact, however, adherence to the statutory mandate precluding Commission jurisdiction over production activities does not mean such activities are unregulated. To the contrary, production is already regulated in the precise manner contemplated by Congress.

[8] *United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392, 402 (1965).

[9] 347 U.S. 681.

The basic purpose of the Gas Act was to bring within the jurisdiction of the Commission those natural gas related activities which, under the state of the law existing at the time the Act was passed, the states had no power to regulate. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). Thus the exemptions of Section 1(b) were designed to leave to the states regulation of matters over which the states did have power and which were therefore deemed to be of local concern. As stated in *Panhandle*, "The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies."[10]

One of the areas reserved to the states and over which the states have and have always had authority is production of the mineral resources from lands located within state boundaries. *FPC* v. *Panhandle Eastern Pipe Line Co., supra; FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The states have established regulatory bodies which have both the expertise and the statutory authority to regulate production. *See, e.g.* TEX. REV. CIV. STAT. ANN. art. 6049c (1962).

With respect to the offshore Federal domain, Congress, under the Outer Continental Shelf Lands Act,[11] placed the regulation of offshore production in the hands of the Department of Interior, not the Commission. Interior discharges this statutory responsibility through the United States Geological Survey and has adopted regulations which cover in detail every aspect of production from offshore Federal domain acreage.[12] Those regulations provide, in essence, that the operator of an offshore lease must conduct operations as a prudent operator. 30 C.F.R. § 250.33(d).

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[10] 337 U.S. 504.

[11] 43 U.S.C. §§ 1331-1343.

[12] 30 C.F.R. §§ 250.1, *et seq.* Production from federal lands onshore is covered by the Federal Mineral Leasing Act, 30 U.S.C. §§ 181, *et seq.* (1971).

With the enactment in December, 1975 of the Energy Policy and Conservation Act (EPCA), Congress has once again made clear its determination that the regulation of development and production of gas reserves is a matter for the Department of the Interior and the states. Section 106 of the Act[13] deals with the precise area into which the Commission has intruded under Order 539-B. Section 106 provides that *Interior* shall determine the maximum efficient rate of production from fields containing gas reserves located on federal lands. The maximum efficient rate is that rate which can be sustained without loss of ultimate recovery of gas "under sound engineering and economic principles."[14] Under Section 106(a)(2)(A), the President may require gas production from federal lands at the maximum efficient rate established by Interior

The EPCA also deals with gas production from non-federal lands. Just as it was in the Gas Act, jurisdiction over such production was reserved to the states. Under Section 106(b)(1), the determination of a maximum efficient rate of production from non-federal lands is reserved to the discretion of the appropriate state regulatory bodies.

Thus Congress has determined not once, but twice, and most recently less than three years ago, that production activities on non-federal lands are to be regulated by the states. And Congress has not only expressly withheld from the Commission jurisdiction over production from federal lands, but has on two separate occasions granted jurisdiction of such matters to *Interior*. There is, therefore, no regulatory gap resulting from the Section 1(b) production exemption. Instead, regulation of production is being accomplished precisely as Congress intended.

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[13] 42 U.S.C. § 6214

[14] 42 U.S.C. § 6214(e)(1)

CONCLUSION

For the foregoing reasons Respondents Tenneco Oil Company and Pennzoil Company submit that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the Brief of Respondents Tenneco Oil Company and Pennzoil Company In Opposition on counsel of record for the other parties by depositing copies of it in the United States Mail, postage prepaid, on June 19, 1978.

STEPHEN M. HACKERMAN